No. 80-1082

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IN THE

Supreme Court of the United States

October Term, 1981

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,

Petitioner,

against

WILLIAM R. PHILLIPS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF AND APPENDIX FOR PETITIONER

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Questions Presented

In a state criminal trial, the defense accepted as a juror a man who was then actively seeking employment as an investigator with federal law enforcement agencies. During trial, that juror, having heard about an investigator's position in the District Attorney's Office, wrote a letter applying for that position without mentioning his status as a juror. Although the trial prosecutor learned of the application during trial, it was not disclosed to defense counsel or the trial judge until after trial. Following disclosure and an extensive post-trial hearing, the state judge found beyond a reasonable doubt that the juror was not biased as the result of the pending application, and this finding was affirmed on appeal.

1. In reviewing a state conviction in a federal habeas corpus proceeding, may a federal court ignore the state courts' finding that the juror was not biased and hold that, even absent demonstrable prejudice, the prosecutor's failure to disclose the juror's letter was of itself a violation of due process which required a new trial?

   The United States Court of Appeals for the Second Circuit, in a 2-1 decision, answered this question in the affirmative.

2. Are the findings and conclusions by the state courts irrelevant because the juror's letter created a conclusive presumption of bias, which could not be rebutted?

   The United States Court of Appeals for the Second Circuit did not reach this question but the United States District Court for the Southern District of New York answered this question in the affirmative.

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Point—The prosecutor's failure to disclose that during trial a juror had applied for a job in the District Attorney's Office did not prejudice respondent's constitutional right to an impartial jury trial because the Constitution requires only that jurors be actually impartial and, as required by this Court, the state judge held a post-trial hearing and found beyond a reasonable doubt that the juror was not biased 22

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(1) The prosecutor's failure to disclose the juror's letter during trial did not prejudice respondent's right to an impartial jury because the state judge conducted a post-trial hearing to determine the juror's impartiality, which is the constitutional equivalent of any procedure that would have been held during trial 23

(2) The state judge's finding that the juror was not biased is presumed correct, and is fully supported by the record 34

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On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONER

The New York County District Attorney, on behalf of the State of New York, as counsel for Harold J. Smith, Superintendent of Attica Correctional Facility, appeals from a judgment of the United States Court of Appeals for the Second Circuit. By that judgment, the Court of Appeals, by a divided court (2-1), affirmed a judgment of the United States District Court for the Southern District of New York (PIERCE, J.), granting a writ of habeas corpus to respondent William R. Phillips.

Opinions Below

The opinion of the Court of Appeals for the Second Circuit affirming the grant of habeas corpus (App. A, 1a-12a)[1] is reported at 632 F.2d 1019 (1980). The opinion of the United States District Court for the Southern District of New York granting the writ of habeas corpus (App. B, 13a-29a) is reported at 485 F. Supp. 1365 (1980). The opinion of the state trial judge denying the motion to set aside the conviction (App. E, 33a-57a) is reported at 87 Misc. 2d 613, 384 N.Y.S.2d 906 (1975). The order of the Appellate Division, First Department, affirming the judgment of conviction without opinion is reported at 52 A.D.2d 758, 384 N.Y.S.2d 715 (1976). Finally, the order of Chief Judge Breitel denying leave to appeal to the New York Court of Appeals is reported at 39 N.Y.2d 949, 386 N.Y.S.2d 1039 (1976).

Jurisdiction

The judgment of the Court of Appeals was entered on September 26, 1980 (App. F, 58a-59a). Rehearing was denied on December 8, 1980 (App. G, 60a-61a). The petition for a writ of certiorari was filed on January 1, 1981, and this Court granted the petition on February 23, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254 (1).

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the appendix to this brief.

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1. The parties have agreed that Appendices A through G to the petition for certiorari should constitute the Joint Appendix, and on April 20, 1981, the Court granted the State's motion to dispense with printing the appendix. References, therefore, are to the appendices to the petition for certiorari.

Statement of the Case

Introduction

On Christmas Eve, 1968, on Manhattan's fashionable East Side, William Phillips, a corrupt New York City police officer, entered a house of prostitution operated by a pimp and bookmaker named Jimmy Smith. Phillips had been demanding money from Smith and, when Smith again refused to pay, Phillips shot him in the head at point blank range and killed him. Phillips then shot two eyewitnesses, Sharon Stango, a nineteen-year-old prostitute who worked for Smith, and Charles Gonzalez, a customer at the bordello. Ms. Stango was killed, but Gonzalez, though seriously wounded, survived. After the shootings, Phillips calmly rang for the elevator, rode to the lobby, thanked a handyman for opening the door for him and walked off into the night.

An investigation of the murders met with no success until late 1971, when Phillips, who had been caught extorting payoffs from a notorious madam, testified at the televised hearings on police corruption conducted by the highly publicized New York City Knapp Commission. At that time, a detective who had been assigned to investigate the Smith-Stango murders realized that Phillips resembled the composite sketch of the killer which had been obtained from the eyewitnesses. The investigation culminated in Phillips' indictment by a New York County grand jury for the murders of Smith and Stango and the attempted murder of Gonzalez (Ind. No. 1370-72). Phillips proceeded to trial on June 28, 1972. On August 9, 1972, the jury reported itself unable to reach a verdict, and a mistrial was declared.

Between the first and second trials, there came to light evidence which destroyed Phillips' alibi, as well as evidence showing that he, despite his denial, had possessed a sweater identical in color to that worn by the killer. The second

trial resulted in conviction for both murders and for the attempted murder and Phillips was subsequently sentenced to a term of from twenty-five years to life imprisonment.

The Trial

Phillips' second trial, the subject of the instant petition, began before New York State Supreme Court Justice Harold Birns on September 16, 1974. During the nine-week trial, forty-four witnesses, including Phillips, testified.

Charles Gonzalez, the surviving victim, identified Phillips as the man who shot him, after shooting Jimmy Smith and Sharon Stango at point blank range in the head (Gonzalez: 634-38).[2] Richie Stevens, the handyman of Smith's building, also identified Phillips as the man who entered the building moments before the killings, went up to Smith's apartment, and then left the building moments before the bodies were discovered (Stevens: 2090-91, 2101-03). There was also testimony from several of Smith's prostitutes and customers that Phillips had been shaking down Smith for money since 1965, had repeatedly come to Smith to demand money as Christmas Eve, 1968 approached, and, the night before the murders, had threatened to "blow Smith's fucken head off" if Smith did not pay him $1,000 the following day (Rogers: 1381, 1387; Charmello: 2334-42, 2347-48, 2356, 2488-89; Stevens: 2082; Lee: 1110; Schafer: 1252, 1277; Connolly: 939-40).

Phillips denied having committed these crimes. He admitted extorting money from Smith but denied any contact with him after 1965 (Phillips: 4223-26, 4237-38, 4506-08). He also presented an alibi defense and called several relatives and friends in an attempt to show that he and his wife were in Queens at the time of the shootings (Phillips: 4493-99; Mrs. Phillips: 3431-36, 3439-40; Slack: 3173, 3186-

2. Page references in this section refer to the minutes of Phillips' second trial.

87; J. McKee: 3726; M. McKee: 5250-51; Leavy: 3800-06; Callahan: 5228).

During cross-examination of Phillips, a tape recording of statements he made while cooperating with the Knapp Commission was played. This recording showed that Phillips had admitted, contrary to what he had said in direct examination, that he was extorting $100 monthly from Jimmy Smith after 1965 (Phillips: 5195). On cross-examination, Mrs. Phillips admitted having told a police officer between the first and second trials that she had lied at the first trial when she testified that Phillips was with her at the approximate time of the murders (Mrs. Phillips: 3554-56). Also on cross-examination, Phillips admitted he knew that the murderer had been described as wearing a green turtleneck sweater, but maintained that he did not own such a sweater and that he never wore green clothes (Phillips: 4692-93). In rebuttal, the People introduced three photographs taken by Henry Bergman, Phillips' business partner, showing Phillips wearing different green shirts (Bergman: 5462-66; Peo. Exhs. 112A, B, D). Bergman also recalled seeing Phillips dressed in green clothes on several occasions, including a green striped polo shirt, a green banlon shirt, and a forest green turtleneck sweater (Bergman: 5457-59).

On November 21, 1974, after only nine hours of deliberation, the jury convicted Phillips of the murders of Smith and Stango and the attempted murder of Gonzalez.

The Post-Verdict Motion and Hearing on Juror and Prosecutorial Misconduct

Background

On October 22, 1974, in the midst of trial, juror John Dana Smith wrote a letter in which he applied for a position as a civilian investigator with the New York County District Attorney's Office.

His letter did not indicate that he was a juror. The trial prosecutors learned of the application on November 14. The prosecutors, after assuring that no one from their office would contact the juror about the job, believed that no further action, *i.e.*, informing the court or defense counsel, was necessary.

After the verdict, on December 4, 1974, assistant district attorney LaPenta became concerned with what he felt were false public statements and accusations (unrelated to the juror issue) which Phillips' trial counsel had made concerning the prosecution (LaPenta: H 396).[3] He told John Keenan, the Chief Assistant District Attorney, about Smith's application (LaPenta: H 397; Keenan: H 553-54). Mr. Keenan immediately summoned to his office all those assistant district attorneys who knew about the matter (Keenan: H 556-64). After speaking to the assistants, Keenan notified then District Attorney Richard Kuh (Kuh: H 806-12). Mr. Kuh brought the matter to the attention of the court and the defense on December 9, 1974, the first date the court and defense counsel were available.

When the application was disclosed, Phillips moved, pursuant to New York Criminal Procedure Law section 330.30(2), for a new trial. He alleged that Smith was a biased juror in the control of the prosecution. On December 9, 1974, a hearing began before the trial judge, Justice Harold Birns, at which there was testimony from juror Smith, the trial prosecutors, and all of those who were involved in or knew about Smith's application.[4]

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3. Numerical references preceded by "H" are to pages of the transcript of the post-verdict hearing, which has been transmitted to the Court as part of the record on appeal.

4. The hearing also concerned another juror, Lawrence Bethel. During trial, the prosecutors learned that Bethel had been arrested for possessing narcotics several months prior to trial. Bethel's case

(footnote continued on next page)

The Hearing

Smith was sworn as the third juror on September 24, 1974. He was examined on the voir dire by both parties on September 23, 1974. A Vietnam veteran, he said that he expected to graduate from the Columbia University School of General Studies in October 1974, that he planned a career in law enforcement, and that he had an application pending for a position as an investigator with a federal drug enforcement agency (SVD 5).[5] Smith had worked as a store detective for Bloomingdale's Department Store for one year during 1972 and 1973 and had made several arrests, after which he had cooperated with the New York County District Attorney's Office (SVD 6). In addition, Smith's wife was interested in the criminal justice system and was studying criminology at John Jay College (SVD 4). She had been the victim of a robbery in which she had been stabbed and seriously injured (SVD 9). Her assailant had been prosecuted by the New York County District Attorney's Office (*id.*).

Defense counsel was extremely sensitive to Smith's candid expression of interest in law enforcement. So he asked Smith the following question:

> You've sort of been on the side of the law and law enforcement, making arrests for Bloomingdale's and now you are about to be appointed with a law

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had been adjourned in contemplation of dismissal upon his agreement to cooperate as a witness in the case pending against the man who had sold him drugs. The prosecutors revealed these facts at the close of evidence, and the juror was excused upon consent of the parties before jury deliberations began. Neither the circuit nor district courts reached the issue of whether Bethel's presence on the jury prior to jury deliberations prejudiced Phillips; consequently, the hearing evidence concerning Bethel will not be related here.

5. Numerical references preceded by "SVD" are to the minutes of Smith's voir dire examination. These minutes, which were introduced in evidence at the post-verdict hearing, have been transmitted to this Court as part of the record on appeal.

> enforcement agency with the Federal Government. Obviously in this case Bill Phillips is being accused and being prosecuted by the District Attorney's Office and members of the Police Department in the City of New York, who are a central part of law enforcement—and I'm sure you are aware from your background of what you know—that Bill Phillips sits here in this case just like in every criminal case; and our system of law says that he's presumed to be innocent. Now, do you feel that in this particular case, in spite of your experience, that the term presumption of innocence, as applies in this case, is not just theoretical, but the real meaningful law? Will you be able to keep that in mind? (SVD 20-21).

Smith said that he would presume Phillips to be innocent (*id.*). He assured defense counsel that if he had a reasonable doubt about Phillips' guilt, he would not hesitate to acquit (SVD 22). He also told the prosecutor that he would be a "fair and impartial juror in the case" (SVD 15-16).

Despite his interests, his experience in law enforcement and his obvious desire to work in that field, Smith was accepted by the defense without challenge—even though the defense had peremptory challenges available.[6]

Thereafter, during the trial, Smith had lunch with a friend, Rudy Fontane, a Criminal Court officer (Smith: H 62-65; Fontane: H 126). They discussed their mutual interest in careers in law enforcement. Fontane said that he was thinking of applying for a position as a rackets investigator in the District Attorney's Office (Smith: H 62-64; Fontane: H 128). Fontane also said that he had heard that a federally funded position for a major felony investigator had opened in the District Attorney's Office. Upon hearing this, Smith said that he was interested in the major felony position. Fontane then said that he would inquire of

6. Each party had 20 peremptory challenges. The defendant used only 12 in the entire voir dire.

a friend in the District Attorney's Office about how to apply for the job. Fontane never suggested to Smith that his friend could use influence to help Smith get the job (Fontane: H 129-31, 134). Smith later discussed the job with Wallace Reilly, his former boss at Bloomingdale's and a former Legal Aid lawyer. Reilly suggested that Smith apply for the position (Smith: H 60).

Fontane contacted Michael Mulderrig, one of the District Attorney's civilian investigators. Without mentioning Smith, Fontane inquired how one would apply for a position as an investigator (Fontane: H 131; Mulderrig: H 199). Mulderrig said that a resume should be sent directly to the District Attorney (Fontane: H 134; Mulderrig: H 200). Fontane also spoke with Mario Piazza, a grand jury warden, and asked where a friend of his, whom Fontane did not name, should send an application for a position as an investigator. Piazza promised to inquire within the District Attorney's Office (Piazza: H 226-29, 236).

Fontane told Smith that he had learned that Smith should simply file an application and resume with the District Attorney's Office (Smith: H 736-38; Fontane: H 160). On or about October 22, 1974, Smith gave his letter of application to Fontane, who mailed it to the District Attorney's Office (Smith: H 69-70; Fontane: H 135-36). Fontane later told Smith only that he had "taken care of" the letter. He never told Smith about any particular inquiries made on Smith's behalf, either before or after submitting the application (Smith: H 736-38; Fontane: H 160). Smith's application did not mention that he was a juror.

About one week later, Piazza fortuitously met Fontane and Smith, who were having lunch in a bar. Fontane introduced Smith to Piazza and said that Smith was the friend who was applying for a job with the District Attorney's Office (Piazza: H 229-31, 235; Smith: H 79-80,

738). Other than the exchange of greetings upon being introduced to one another, Piazza and Smith had no conversation and Piazza did not join Smith and Fontane for lunch (Piazza: H 229-32, 235). Smith never asked Piazza to make inquiries on his behalf and was not told if Piazza did so (Smith: H 80).

Smith's application was received at the District Attorney's Office on October 23 and was forwarded to Kenneth Conboy, then the Administrative Assistant District Attorney (Chief Assistant District Attorney Keenan: H 544-45). Conboy was on vacation. Upon his return, on about November 9, Conboy sent Smith's application to Joan Sudolnik, the assistant district attorney in charge of the Major Felony Program (Sudolnik: H 303; Keenan: H 545). Ms. Sudolnik in turn referred the application to John Lang, the assistant district attorney who was handling employment applications for the program (Sudolnik: H 310).

Thereafter, again without Smith's knowledge, Fontane met assistant district attorney Robert Holmes and mentioned his (Fontane's) and Smith's applications (Fontane: H 141; Smith: H 735-38). Fontane also said that Smith was a juror in the Phillips case (Fontane: H 143; Holmes: H 280-81). This was the first time that anyone associated with the District Attorney's Office heard that a juror had applied for a job. On November 13, 1974, Holmes promptly told Sudolnik what he had learned (Holmes: H 283-84). Sudolnik immediately obtained Smith's application and discovered that no one had responded to it. She instructed Lang and her secretary not to correspond with Smith until after the Phillips trial, and she attached a note to that effect to the application (Holmes: H 285; Sudolnik: H 307-10; Lang: H 361).

On November 14, Ms. Sudolnik met Litman and his associate, Phillip LaPenta, and told them about Smith (Su-

dolnik: H 311; LaPenta: H 388; Litman: H 941-42). Litman, who was then preparing for a crucial stage of Phillips' cross-examination, asked whether Smith had been contacted and whether Smith's application indicated that he was a juror (Litman: H 943). Ms. Sudolnik said that no one had responded to the application and that it consisted of a form letter and resume and contained no reference to Smith's jury service (Sudolnik: H 313; LaPenta: H 391; Litman: H 944-45). Litman said that he did not wish to know about anything contained in Smith's resume, since he felt that it would be improper for him to know anything which had not been disclosed on the voir dire (Litman: H 946). He then directed Sudolnik not to have any contact with Smith.

Litman and LaPenta discussed what they had learned and concluded that, because, on the vior dire, Smith had candidly revealed that he wanted a career in law enforcement, that he had actually applied for such jobs, and that he had had many previous contacts with the District Attorney's Office, it was not improper for Smith to have applied for a job in the District Attorney's Office (LaPenta: H 414; Litman: H 950-51). Litman and LaPenta believed that as long as no one in the District Attorney's Office contacted Smith and that they, the trial assistants, learned nothing about Smith which was not disclosed on the voir dire, there was no reason to tell the court and the defense about Smith's application (LaPenta: H 413-14, 421; Litman: H 950-55, 967-73).

The verdict against Phillips was returned on November 21, 1974. Up to that time, there had been no contact, direct or indirect, between the District Attorney's Office and Smith (Smith: H 76, 730). The day after the jury had been discharged, Smith telephoned Ms. Sudolnik to ask about his application. He did not mention that he had been a juror

in the Phillips case (Smith: H 66). She did not recall receiving Smith's call (Sudolnik: H 332, 773), but Smith testified that she told him that his application would have to be processed through the New York City Department of Personnel (Smith: H 67). Thereafter, Smith called his former supervisor, Wallace Reilly. Since Reilly knew several assistant district attorneys, Smith asked Reilly to call Sudolnik to ascertain Smith's chances for employment (Smith: H 67; Reilly: H 164). Reilly then learned from Sudolnik that hiring would be based on experience (Smith: H 67; Reilly: H 164; Sudolnik: H 772). When Smith learned this, he abandoned hopes of being hired by the District Attorney's Office (Smith: H 67).

At the hearing, Smith testified that he felt that there was nothing improper in his applying for a job at the District Attorney's Office while he was a juror (Smith: H 725). He had disclosed on the voir dire that he had an application pending with the Drug Enforcement Administration, and during trial he had applied for a position with another federal agency, The Bureau of Alcohol, Tobacco, and Firearm Control (Smith: H 719-20). Smith then engaged in the following colloquy with Phillips' attorney:

> Question: Do you think that [being a juror] might have helped you, that might have been helpful in considering you as an applicant for the job?
>
> Answer: Mr. Rothblatt, I swore an oath to listen to the evidence and to render a verdict on that evidence. I did so.
>
> Question: I didn't ask you—
>
> Answer: To imply that I worked the jury's mind is repugnant to me and to the other jurors.
>
> Question: I didn't ask you that.
>
> Answer: Well, I'm telling you that this wasn't in my mind. I didn't consider it favorable. Miss Sudol-

nik had nothing to do with this case so far as I'm concerned (H 747).

* * *

Question: Did you think that you would be considered for this job as investigator for the District Attorney's Office if you voted to acquit Mr. Phillips? Yes, or No.

Answer: I didn't think about whether or not to acquit or convict Phillips had anything to do with the job. I didn't think about it at all, one way or the other (H 748-49).

* * *

Question: You mean you never thought for a moment that an acquittal in this case, the people in the District Attorney's Office would look upon you unfavorably as an investigator working for their staff if you felt that Mr. Phillips was entitled to an acquittal; is that what you're telling us?

Answer: Yes, that's what I'm telling you. Why would the DA's Office care about my actions as a juror? You're the one who's suggesting it, no one else—(H 750).

The Trial Court's Decision

In a decision dated January 20, 1975, Justice Birns denied Phillips' motion to set aside the verdict. Justice Birns concluded that although Smith's letter was "indeed an indiscretion, in light of his voir dire [the letter] in no way reflected a premature conclusion as to the defendant's guilt, or prejudice against the defendant, or an inability to consider the guilt or innocence of the defendant solely on the evidence" (*id.* at 51a). The trial judge based his conclusion upon "an examination of all the facts and circumstances disclosed at this hearing" (*id.* at 51a), which in the court's view, showed that Smith's application reflected no "state of mind on the part of this juror other than that acknowledged by the defense when it accepted the juror"

(*id.* at 43a); that Smith's "predilection for law enforcement was well known to the defense" (*id.* at 43a); that it was Smith's "faith in his own integrity, in his own ability to render a verdict on the evidence, which permitted him to send his letter of application to the District Attorney and ignore the possible construction which might be placed upon such action" (*id.* at 43a-44a); and that "no dialogue or bilateral communication between Juror Smith and representatives of the District Attorney's Office has been established" (*id.* at 51a).

Justice Birns also rejected Phillips' contention that the verdict should be set aside because the prosecutors acted improperly in the manner in which they disclosed Smith's application, and because their failure to disclose the application immediately made it impossible for the court to discharge the juror during trial. Justice Birns noted that the statutes governing challenges to jurors prior to verdict (New York Criminal Procedure Law §§270.35[2] & 280.10 [1]) require that the jurors have engaged in "substantial misconduct." Under New York law, this means misconduct "of such import as to affect adversely the ability of the juror to sit fairly and impartially assess the issues on trial" (*id.* at 55a). Smith's application did not, in fact, render him partial or biased. Therefore, although the prosecutors exercised poor judgment in failing to disclose the application earlier, Phillips would not have been entitled to dismissal of Smith even if the application had been disclosed prior to jury deliberations, and the trial judge would have denied any such motion (*id.* at 56a).

In sum, Justice Birns concluded that Smith was an impartial juror beyond a reasonable doubt and, despite the mistake in judgment on the part of both Smith and the prosecutors, there was no showing of juror bias which would have required a new trial (*id.* at 57a).

The State Post-Conviction Proceedings

Direct Appeal

On appeal to the Appellate Division, First Department, Phillips renewed his claim, made in his post-verdict motion, that he was prejudiced by the juror misconduct and by the prosecutors' conduct as well. Phillips also contested the sufficiency of the evidence, a number of the trial court's evidentiary rulings, and portions of the charge. On April 26, 1976, the Appellate Division unanimously affirmed, without opinion, Phillips' conviction. 52 A.D.2d 758, 384 N.Y.S. 2d 715. On May 28, 1976, leave to appeal to the New York Court of Appeals was denied by Chief Judge Charles Breitel. 39 N.Y.2d 949, 386 N.Y.S.2d 1039.

State Collateral Attack

On April 25, 1978, Phillips moved in New York Supreme Court, New York County, to vacate the judgment of conviction, pursuant to New York Criminal Procedure Law section 440.10. He argued, *inter alia*, that even though he was granted immunity by United States Attorney Whitney North Seymour, Jr. for a tape recording which he made for the New York City Knapp Commission, the recording was still introduced at trial to show that he was extorting money from one of the murder victims, Jimmy Smith, since 1965. On January 3, 1979, New York State Supreme Court Justice Irving Lang summarily denied the motion on the ground that the claim of immunity had not been made before trial and thus, under state law, Phillips had forfeited his right to judicial review of that claim. 97 Misc. 2d 665, 412 N.Y.S.2d 94. On February 15, 1979, leave to appeal to the Appellate Division, First Department, was denied by Presiding Justice Francis T. Murphy, Jr.

The Federal Habeas Corpus Proceeding

The District Court Decision

On April 5, 1979, Phillips sought habeas corpus review in the United States District Court for the Southern District of New York. The thrust of the petition was Phillips' contention that the tape recording admitted to impeach him had been immunized by United States Attorney Seymour. On May 25, 1979, Phillips filed what he called a "supplemental petition" simply alleging, without supporting argument, a denial of due process based upon the facts adduced at the state post-verdict hearing concerning juror and prosecutorial misconduct.

District Court Judge Pierce did not reach the issues of whether immunized testimony was admitted at trial. Rather, he granted the writ of habeas corpus solely on the ground that juror Smith was "impliedly biased." Judge Pierce indicated that the record supported fully the trial court's finding that Smith's judgment was not influenced by his application and that Smith was therefore not actually biased. Judge Pierce noted that petitioner had ample opportunity to adduce evidence of actual bias, and that the trial judge, who concluded that there was no actual bias, had observed the demeanor of all the witnesses, including juror Smith, who testified at the post-verdict hearing (App. B, 25a).

Despite the fully supported conclusion that Smith was in fact an unbiased juror, Judge Pierce found that there was a "conclusive presumption" of bias (*id.* at 26a), because "it is reasonable to conclude that the average person in Smith's position would believe that the verdict of the jury would directly affect the evaluation of his job application" (*id.* at 27a). Judge Pierce, although not grounding his decision on a finding of prosecutorial misconduct,

noted that because the trial prosecutor failed to bring Smith's letter to the attention of the trial judge before the jury retired to deliberate, he "must share the responsibility for this inexcusable abridgement of the petitioner's Sixth Amendment right" (*id.* at 29a).

The Second Circuit Decision

On September 26, 1980, by a 2-1 decision, the United States Court of Appeals for the Second Circuit affirmed the district court's judgment. The majority, unlike Judge Pierce, did not rest its decision on "implied bias." Rather, the majority seemingly accepted the invitation of respondent to begin "cleansing" from the state criminal justice process the allegedly "endemic misconduct" of prosecutors (Second Circuit Brief for Appellee: 31).

Accordingly, relying on *United States* v. *Agurs*, 427 U.S. 97 (1976), the majority concluded that the prosecutor's failure to disclose the juror's job application violated Phillips' right to due process of law, regardless of the juror's actual impartiality (App. A, 9a-10a). The majority reasoned that if the job application had been reported to the judge during trial, there was a substantial likelihood that the judge would have excused the juror. On the other hand, at a post-verdict hearing, it was not likely that the judge would set aside the verdict because of the juror's application (*id.* at 7a, 10a). Thus, according to the majority, Phillips was prejudiced by the prosecutor's failure to disclose, notwithstanding the fully supported conclusion that the juror was actually impartial (*id.* at 10a).

In dissent, Judge Van Graafeiland agreed that the trial prosecutor had been wrong in not disclosing the juror's application but concluded that this failure had not prejudiced Phillips because the juror was found to have been

actually impartial. Judge Van Graafeiland made the point, undisputed by the majority, that the state post-trial hearing into the juror's impartiality was precisely the procedure required by this Court as well as the Second Circuit (*id.* at 11a). Judge Van Graafeiland noted that the majority did not dispute that the state hearing record supported the trial judge's finding of impartiality. Thus, it was clear that habeas corpus was granted solely because of prosecutorial misconduct, although there was no prejudice (*id.* at 12a). Given the absence of prejudice, Judge Van Graafeiland believed that, rather than interpreting the Constitution, the majority was exercising supervisory powers over the administration of justice in the state courts, thereby usurping the power of the state judiciary (*id.* at 12a).

On October 10, 1980, the State sought rehearing and rehearing *en banc,* which the Court of Appeals denied on December 8, 1980. On January 1, 1981, the State filed its petition for a writ of certiorari, which was granted on February 23, 1981.[7]

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7. Phillips has remained in custody throughout the federal proceedings. After the district court granted habeas corpus relief, he unsuccessfully sought bail from state court, as well as the district court, the Second Circuit and Mr. Justice Marshall. After the circuit court affirmed the judgment granting habeas corpus, a state Supreme Court justice granted bail. However, the Appellate Division of the New York State Supreme Court prohibited petitioner's release because the grant of habeas corpus did not become effective until issuance of the mandate; thus, there were still valid state convictions for murder and state law prohibited bail for persons so convicted. Subsequently, the Second Circuit denied motions for bail or immediate issuance of the mandate and then stayed the mandate pending an application for certiorari. Subsequently, Mr. Justice Marshall denied an application to vacate the stay of the mandate which, following the granting of certiorari, continues in effect until a decision by this Court. Finally, a New York State Supreme Court justice sitting in Wyoming County denied a state petition for habeas corpus; respondent filed a notice of appeal from that denial but as of May 21, 1981, that appeal has not been perfected.

Summary of Argument

In this most significant state prosecution of a corrupt police officer charged with murder, there is no dispute that the state trial prosecutor wrongly failed to disclose during trial that a sitting juror had sent a letter applying for a job with the District Attorney's Office. Disclosure was made after trial, by the District Attorney himself; the state trial judge held a full post-trial hearing and found that the juror was in no way influenced by having applied for a job. The Second Circuit ignored these findings and, absent any demonstrable prejudice, granted habeas corpus relief solely because of the prosecutor's failure to disclose. However, prosecutorial misconduct that does not create actual prejudice provides no legal basis for a federal habeas court to interfere with the state criminal justice system and order the release of a state prisoner.

In this case the information withheld during trial was material to a determination of whether Phillips was afforded his constitutional right to an impartial jury trial. By contrast, other cases involving a prosecutor's duty to disclose that have come before this Court concerned prosecutorial failure to disclose exculpatory evidence. Such a failure affects an accused's constitutional right to be convicted only on proof establishing guilt beyond a reasonable doubt, and the right to present evidence on his own behalf.

The distinction between the constitutional rights involved in this case and the other category of cases is crucial. The distinction is crucial because in these other cases, once it was found that the prosecutor, by failing to disclose, had violated an accused's right to present material evidence to a jury, the appropriate remedy was to afford the accused an opportunity to present that evidence to a jury. Since the original jury was no longer available, a new trial was the only appropriate remedy.

However, claims concerning juror bias are decided by a judge who, unlike a jury, is available after trial to hold a hearing and make findings of fact and conclusions of law. A hearing after trial affords a judge the same opportunity to decide the claim of bias as he would have had if disclosure had been made during trial. Indeed, under a long line of federal cases starting with this Court's decision in *Remmer* v. *United States*, 347 U.S. 227 (1954), a post-trial hearing has been the remedy for post-verdict claims based upon alleged juror bias.

Accordingly, in this case, where evidence of possible juror bias was withheld from the judge during trial, a post-trial hearing to determine the pending application's influence, if any, on the juror was the appropriate initial remedy. If after that hearing the judge had concluded that the juror was, in fact, influenced, then the judge would have had to order a new trial. Here, however, the juror was found impartial and no new trial was required.

Put simply, if the prosecutor had disclosed the letter during trial, the Constitution would have required the trial court to conduct a hearing to decide whether the juror could no longer remain impartial once he made the application. The same inquiry can be and was made after trial; thus, there was no prejudice arising from the prosecutor's failure to disclose.

Of course, to deter future prosecutorial conduct of this kind, a court having supervisory power could choose to ignore the lack of prejudice and simply reverse to assure disclosure in the future. Unfortunately, the majority below failed to understand that on a federal habeas corpus challenge to a state conviction, a federal court has no supervisory powers and can only grant the writ when a state prisoner has been actually prejudiced by prosecutorial misconduct. As stated by Judge Van Graafeiland dissenting

below, the prosecutor's conduct, no matter how improper, did not prejudice respondent's right to an impartial jury. Here there was no such prejudice because, as required by *Remmer*, the state judge, in a full, fair and adequate post-trial hearing, found beyond a reasonable doubt that the juror was not influenced by the pending application.

Under 28 U.S.C. §2254(d), those findings are presumed correct. Here that presumption is fully supported by the evidence at the state hearing. That evidence demonstrates eloquently and persuasively that the juror was in no way influenced by the fact that he had sent a letter applying for an investigator's position with the District Attorney's Office.

Nor does the Constitution, as the district court held, require that the application be treated as having given rise to a conclusive presumption of bias, which could not be rebutted by the hearing evidence. As seen from another long line of federal cases commencing with *United States* v. *Wood*, 299 U.S. 123 (1936), the Constitution, unlike the statutes and common law of some jurisdictions, does not require a challenge to potential jurors for cause based upon a conclusive presumption of bias, *i.e.*, "implied bias." Rather, the Constitution requires only that the trial judge follow appropriate procedure to assure that prospective jurors are free from actual, as distinguished from implied, bias.

Moreover, even where established by statute or common law, the doctrine of "implied bias" applies only during jury selection. Subsequent challenges to jurors must be based upon a finding of actual bias on the part of the particular juror.

In this state prosecution, after the appropriate post-trial inquiry, the juror in question was found to have been, in fact, impartial. Thus, the respondent was convicted by

twelve impartial jurors and thereby afforded the jury trial guaranteed by the Constitution. Given the finding of impartiality, the respondent suffered no prejudice from the failure to disclose and, absent prejudice, the federal courts below simply had no legal basis to invalidate a seven-year-old state conviction and order a new trial for an accused charged with a crime committed twelve years ago.

POINT

The prosecutor's failure to disclose that during trial a juror had applied for a job in the District Attorney's Office did not prejudice respondent's constitutional right to an impartial jury trial because the Constitution requires only that jurors be actually impartial and, as required by this Court, the state judge held a post-trial hearing and found beyond a reasonable doubt that the juror was not biased.

Introduction

In the absence of prejudice, a federal court may not grant habeas corpus relief to a state prisoner based upon prosecutorial misconduct. Yet, without disagreeing with the state judge's finding of impartiality and pointing to no prejudice resulting from the prosecutor's failure to disclose, the circuit court majority held that the writ was properly granted because "the prosecutor may not keep silent when he knows that a juror has applied to become his employee" (App. A at 10a).

To demonstrate that Phillips was not prejudiced by the prosecutor's failure to disclose the letter of application until after trial, we will show that the state post-trial hearing to determine whether the juror was biased was constitutionally equivalent to any procedure which could have been conducted during trial. Next, we will show that because the full, fair and adequate post-trial hearing established that

the juror was not biased, it follows that the prosecutor's failure to disclose in no way prejudiced the defendant. We will then analyze the state judge's findings and conclusions about the juror's impartiality—which are, of course, presumed correct—to show that they are indeed fully supported by the record.

The district court, however, held that the findings and conclusions by the state judge were irrelevant because the juror's letter created a conclusive presumption of bias which could not be rebutted. The district court also erred. It erred because, as will be shown, the Constitution requires only the exclusion of jurors who are actually biased and in determining that question, there is no constitutional requirement calling for application of a conclusive presumption of bias.

(1) The prosecutor's failure to disclose the juror's letter during trial did not prejudice respondent's right to an impartial jury because the state judge conducted a post-trial hearing to determine the juror's impartiality, which is the constitutional equivalent of any procedure that would have been held during trial.

The court below held that respondent should be given a new trial because the trial prosecutor failed to disclose during trial that a juror had applied for a position in the District Attorney's Office. In so holding, the circuit majority incorrectly relied on *United States* v. *Agurs*, 427 U.S. 97 (1976). The *Agurs* case addressed the consequences of a prosecutor's failure to disclose evidence relevant to the jury's determination of guilt or innocence. This Court concluded that only an accused who is actually prejudiced by such a failure to disclose is entitled to a new trial (*id.* at 106, 108, 111-12). Whether an accused has been prejudiced turns on whether the withheld evidence is "material,"

i.e., whether the jury would or could have been influenced by that evidence (*id.* at 103-04, 112, 113).

By definition, the duty to disclose evidence that might have influenced the jury defined the remedy for its breach. Once the jury has been discharged, only a new trial, before a new jury, can cure the prejudice of a verdict which might have been obtained as the result of the prosecutor's failure to disclose material evidence to the accused. With the new trial, the accused is accorded the fair proceeding to which he was entitled and which was denied by the prosecutor's failure to disclose.

This case involves, not the failure of a prosecutor to disclose evidence that might have affected a jury, but rather a prosecutor's failure to disclose information which, according to the majority below, had a "fair likelihood" of affecting a judge's determination concerning a juror's impartiality (App. A at 10a). The majority below simplistically applied *Agurs* to this case and concluded that here, as in *Agurs*, a new trial was the appropriate remedy for the prosecutor's breach of duty. This simple conclusion is erroneous.

It is erroneous because, as noted, when the evidence withheld could have affected the factual determination of guilt or innocence, that determination must be made by a jury after a new trial. On the other hand, a determination by a judge, such as a finding respecting a juror's impartiality, which can be made by the judge during trial, can also be made at a post-trial hearing without a new trial. Thus, when a juror's impartiality is in question, a defendant is not prejudiced by a failure to disclose relevant information during trial, if the information is disclosed after trial and the juror is found to have been unbiased following a post-trial hearing. This is the teaching of *Remmer* v. *United States*, 347 U.S. 227 (1954), a case ignored by the

majority opinion despite reliance upon it by Judge Van Graafeiland in dissent.

In *Remmer*, this Court ordered a post-trial hearing into the possibility that a juror was affected in his deliberations by an event that occurred during trial. That event was an interview of the juror by the FBI, which was investigating a purported attempt to influence the juror's verdict. During trial, both the judge and the prosecutor knew of the FBI investigation but defense counsel was never so informed.

In the course of its opinion in *Remmer*, the Court noted that there is a presumption of prejudice when, during trial, a juror and non-juror communicate about a matter pending before the jury. Nonetheless, the Court recognized that this presumption is not conclusive and may be rebutted by evidence introduced at a post-verdict hearing.[8] 347 U.S. at 229; *see also Mattox* v. *United States*, 146 U.S. 140, 150

8. Here, in contrast to *Remmer*, the communication by the juror did not specifically relate to a matter before the jury. In such circumstances, the Second Circuit has placed the burden on a defendant to show prejudice. *United States* v. *Brasco*, 516 F.2d 816, 819 (2d Cir.), *cert. denied*, 423 U.S. 860 (1975); *United States* v. *Bufalino*, 576 F.2d 446, 451 (2d Cir.), *cert. denied*, 439 U.S. 928 (1978). No circuit has gone beyond the *Remmer* standard and created a conclusive presumption of prejudice because of communication between a juror and non-juror. The District of Columbia and First Circuits have held that any communication between a juror and a non-juror creates a rebuttable presumption of prejudice. *Ryan* v. *United States*, 191 F.2d 779, 781 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 928 (1952); *United States* v. *Doe*, 513 F.2d 709, 711-13 (1st Cir. 1975). The Ninth Circuit has indicated that it will apply the rebuttable presumption of *Remmer* where the person with whom the juror communicates is interested in the result of the trial, *United States* v. *Love*, 535 F.2d 1152, 1155-56 (9th Cir.), *cert. denied*, 429 U.S. 847 (1976), and the Fifth Circuit has said that any communication between a juror and a prosecutor, whether or not relating to the matter at trial, raises a rebuttable presumption of prejudice. *Pekar* v. *United States*, 315 F.2d 319, 322 (5th Cir. 1963). In any event, regardless of how the rebuttable presumption is characterized or which party has the burden of proof, here the state judge required the prosecutor to establish the absence of prejudice beyond a reasonable doubt and after a hearing found that this burden had been satisfied. *See* App. E at 57a and discussion at pp. 34-39, *infra*.

(1892). Indeed, there is an entire body of federal law, including decisions by the Second Circuit, recognizing the appropriateness of post-verdict inquiry in cases involving improper juror communication during trial. *See, e.g., United States* v. *Johns,* 615 F.2d 672, 676 (5th Cir.), *cert. denied,* —— U.S. ——, 101 S. Ct. 95 (1980); *United States* v. *Gross,* 614 F.2d 365, 368 (3d Cir.), *cert. denied,* 447 U.S. 925 (1980); *Sullivan* v. *Fogg,* 613 F.2d 465, 467 (2d Cir. 1980); *Winters* v. *United States,* 582 F.2d 1152, 1153-54 (7th Cir.), *cert. denied,* 439 U.S. 936 (1978); *Eaton* v. *Wyrick,* 528 F.2d 477, 480-81 (8th Cir. 1975); *United States* v. *Brasco,* 516 F.2d 816, 819 (2d Cir.), *cert. denied,* 423 U.S. 860 (1975).

Notably, in his opposition to certiorari, respondent agreed that generally a post-verdict hearing is the appropriate procedure to determine whether a sitting juror has engaged in conduct that has improperly influenced the juror to vote for conviction. Brief in Opposition to Certiorari pp. 5-7. Nonetheless, he argued that *Remmer* should have no application here because the alleged influence on juror Smith resulted from the conduct of the juror himself —his application for a job—rather than from communication or pressure from an outside source. *Id.* Given this "internal" source of the influence, according to respondent, it is just too difficult to determine whether the juror was affected by the pending letter of application.

This distinction is unpersuasive. The difficulty in determining the effect, if any, of the pending application stems from difficulty inherent in determining a person's state of mind, not from the particular source of the influence on the person. With full exploration of the facts, events and circumstances by cross-examination of the juror as well as other witnesses, there is no reason why the hearing judge could not determine whether the pending application influ-

enced juror Smith, just as the Court in *Remmer* could decide the effect of the FBI inquiry. Notably, neither the district nor the circuit court found the source of the influence to be controlling. Indeed, in federal cases, hearings have been held without regard to the source of the influence. *Compare United States* v. *Johns,* 615 F.2d at 676, *supra* (foreman told by alternate juror that a witness had been killed), *with Sullivan* v. *Fogg,* 613 F.2d at 466-67, *supra* (juror heard voices during trial telling him to acquit but he voted guilty).

In ignoring *Remmer,* the majority below seemed troubled that because of the prosecutor's silence, the hearing on the alleged bias of juror Smith had to be held after trial, rather than before deliberations, when an alternate could have replaced Smith. This concern, however, is misplaced. If we assume that the prosecutor had himself discovered the letter only after the verdict, a post-trial hearing would have been the proper means of determining whether the juror had been actually biased. *See* cases cited in text at p. 26, *supra.* If a post-trial hearing would have been adequate to protect Phillips' sixth amendment right to an impartial jury in that circumstance, there is no reason why such a hearing was any less adequate simply because the prosecutors knew about the letter at an earlier point in time.

There are many reasons why the post-trial hearing required by the *Remmer* case is as adequate as a hearing during trial. In both situations, the judge can observe the juror's reactions during trial as well as his or her demeanor during the hearing. Further, in both situations, the juror can be brought before the court without being told why, thereby preventing preparation for the particular inquiry.

Moreover, the post-trial hearing has at least two advantages over a hearing during trial. First, defense counsel, in cross-examining the juror, would not have to tread lightly in fear that, if his challenge were unsuccessful, he would

then be stuck with a juror who might well hold the cross-examination against his client. Second, at trial there would be pressure to have an abbreviated hearing to get on with the trial. Post-trial, there is no such concern. Indeed, as required by *Remmer*, here counsel was given wide latitude to explore as he saw fit the circumstances surrounding the receipt of the letter, "the impact thereof upon the juror, and whether or not it was prejudicial . . ." 347 U.S. at 230.[9]

The *Remmer*-type hearing but reflects this Court's recent exposition in *United States* v. *Morrison*, —— U.S. ——, 101 S. Ct. 665, 668 (1981) (discussed at pp. 33-34, *infra*), during which it observed that "remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." This is also precisely the teaching of *Brady* v. *Maryland*, 373 U.S. 83, 88-90 (1963). In *Brady*, the information withheld was material only to the question of sentencing. Thus, this Court did not reverse the conviction and order a new trial. Instead, it affirmed the circuit court, which had ordered only a new sentence proceeding to remedy the prejudice from the failure to disclose the material evidence.

9. Interestingly, following the remand in *Remmer*, the district court, unlike the state judge here, reviewed the evidence by using an improper standard and concluded that the juror had not been affected by the FBI inquiry. This Court, using a standard similar to that used here by the state court, subsequently examined the record itself and concluded that the FBI investigation had indeed affected the juror. 350 U.S. 377, 379, 382 (1956).

In contrast to the all-encompassing hearing ordered by the Court in *Remmer*, Rule 606(b) of the Federal Rules of Evidence prohibits testimony about the jury's deliberations or about the effect of the outside influence on the minds of the jurors. The exclusion of testimony about an outside influence's effect on a juror's mind is, of course, in direct conflict with the scope of the hearing envisioned by *Remmer*. *See* 350 U.S. at 379, *supra*. *See also United States* v. *Greer*, 620 F.2d 1383, 1385 (10th Cir. 1980). To the extent that the *Remmer*-type hearing is constitutionally mandated and a defendant wishes to show that a juror was in fact influenced, the evidence rule may have to be ignored. In any event, here, as envisioned by *Remmer*, the state court permitted counsel to explore fully the letter's effect on the juror.

In this case, it was also unnecessary to order a new trial. The information withheld was material only to the question of a juror's alleged bias, and thus the appropriate remedy was a hearing, like that in *Remmer*, to determine if the juror was biased. The finding of impartiality after the hearing meant that respondent had not been prejudiced by the failure to disclose; hence a new trial was not required.

Still, the majority below sought to finesse the requirement of prejudice by concluding that there was a "fair likelihood" that if informed of the juror's application during trial, the state judge would have exercised his discretion and replaced the juror regardless of the juror's actual bias (App. A at 10a). This supposition ignores the state judge's conclusion that even if the application had been disclosed during trial, he necessarily would have denied the motion to remove the juror because the juror was not biased (App. E at 56a). However, even assuming that the majority's speculation was correct and that the state judge did not mean what he said, respondent was still not prejudiced by the failure to disclose during trial. Smith was in fact found impartial, and respondent could not have been prejudiced merely because the state trial judge was denied an opportunity during trial to replace one impartial juror (Smith) with another.

Equally significant, and unmentioned by the majority, is that New York judges have no greater discretion to remove a juror during trial than do their federal counterparts.[10] The failure to mention that New York judges have no greater discretion than federal judges indicates that the

10. *Compare* N.Y. Crim. Proc. Law §270.35 (1975), and *People* v. *Genovese*, 10 N.Y.2d 478, 482-3, 180 N.E.2d 419, 422, 225 N.Y.S. 2d 26, 29-30 (1962), and *People* v. *West*, 38 A.D.2d 548, 549, 327 N.Y.S.2d 493, 495, *aff'd*, 32 N.Y.2d 944, 300 N.E.2d 734, 347 N.Y.S. 2d 203 (1973), *with* Fed. R. Crim. P. 24(c), and *United States* v. *Avila-Macias*, 577 F.2d 1384, 1387 (9th Cir. 1978), and *United States* v. *Moten*, 564 F.2d 620, 629 (2d Cir.), *cert. denied*, 434 U.S. 959 (1977), and *Banks* v. *United States*, 204 F.2d 666, 671 (8th Cir.), *cert. denied*, 346 U.S. 857 (1953).

opinion below is, in part, predicated upon the premise that the state judge would not be willing, after trial, to find that the juror was biased and would thus protect the verdict rather than Phillips' right to an impartial jury. *See* App. A at 7a, 10a. Yet, in federal court under *Remmer* and the other Second Circuit cases (*see, e.g.*, cases cited in text at p. 26, *supra*), a post-trial hearing into juror misconduct is adequate to protect an accused's right to an impartial jury.

Surely, the majority deviated from applicable principles by its failure to treat the state post-trial hearing the same way it would have treated a similar federal hearing under *Remmer*. In the words of Professor Bator, quoted with approval by Mr. Justice Powell in his opinion for the Court in *Stone* v. *Powell*, 428 U.S. 465, 493-94 n.35 (1976): "[t]here is no intrinsic reason why the fact that a man is a federal judge should make him more competent, or conscientious, or learned with respect to the applicable federal law than his neighbor in the state courthouse." Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 509 (1963).

True, these observations in the *Stone* case concerned adjudication of fourth amendment claims but, as made clear by Professor Bator, they apply with equal force to the adjudication of any constitutional claim, including one of juror bias. So that our position will not be misunderstood, we recognize that, unlike fourth amendment claims such as those at issue in *Stone*, claims involving alleged juror bias in a state prosecution may be reviewed in federal habeas corpus proceedings. Nonetheless, in habeas corpus review, federal courts must treat state hearings and the judges who hold them in the same manner and with the same respect afforded *Remmer*-type hearings held by federal judges. *See* 28 U.S.C. 2254(d); *Sumner* v. *Mata*, —— U.S. ——, 101 S. Ct. 764, 770-71 (1981) (discussed at pp. 34-35, *infra*).

Of course, in *Remmer*, because the trial judge knew about the FBI investigation, the failure to hold a hearing at trial on whether the juror had been affected by that investigation resulted from a judicial error, and in other cases the post-trial hearing occurred because of a juror's conduct which was not discovered until after trial. Here, the failure to hold a hearing resulted from a prosecutor's serious error in judgment. Nonetheless, if a post-trial hearing is the constitutional remedy for the failure to hold a mid-trial hearing because of an error by a judge or juror, there is no reason why a post-trial hearing should not also be the appropriate remedy when the fault for not having a hearing during trial lies with the prosecutor—unless, of course, the court below desired to punish the prosecutor. However, this Court has made clear that the governing principle in cases involving the failure to disclose "is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused." *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). And in *Agurs* the Court expressly stated that the constitutional duty to disclose is not to be measured "by the moral culpability, or the willfulness, of the prosecutor." 427 U.S. at 110.[11] Indeed, even in the most

11. To be sure, as the state judge found, by failing to disclose the letter during trial, the trial prosecutor had made a "serious error in judgment" (App. E at 52a). Nonetheless, the decision not to disclose was made in the sixth week of a murder trial in the middle of cross-examining defendant, with the summation only a week away and with knowledge of a problem with another juror—Bethel. *See* discussion in note 5, at p. 11. Moreover, it was not completely unreasonable for the trial prosecutor to believe that the problem with the juror's application could be handled by directing that the District Attorney's Office make no contact with the juror. For, by so directing, the trial prosecutor avoided part of the problem presented in *Remmer* as the result of the FBI meeting with the juror. All of this is not to excuse the failure to disclose but to place it in context. And the state court recognized that it was the pressures of the case, not any desire to secure an unfair advantage, which "becloud[ed] the trial prosecutor's professional vision" and which led to the failure to disclose (*id.* at 51a-52a).

extreme situations, involving a prosecutor's knowing use of perjured testimony, prejudice is shown and reversal required only if there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." 427 U.S. at 103; *accord, Giglio* v. *United States,* 405 U.S. 150, 154 (1972).

Perhaps a court, having supervisory powers over the conduct of a prosecutor, may desire to encourage future disclosure by punishing the prosecutor and ordering a new trial, even though an accused has not been prejudiced and would not otherwise have been entitled to a new trial. Given the departure of the court below from the accepted constitutional principles of *Agurs, Brady* and *Remmer,* the unavoidable conclusion is that this prophylactic device remains the only basis for the majority opinion. Indeed, Phillips in his brief to the court below expressly invited it to exercise such supervisory power (Second Circuit Brief for Respondent: 31). In accepting this invitation, the majority below has, however, gone well beyond the limited scope of federal habeas review. Under the statute defining this scope (28 U.S.C. §2254), habeas corpus review of a state court conviction based on prosecutorial misconduct is a "narrow one of due process, and not the broad exercise of supervisory power that [we] would possess in regard to [our] own trial court." *Donnelly* v. *DeChristoforo,* 416 U.S. 637, 642 (1974). *See also Chandler* v. *Florida,* —— U.S. ——, 101 S.Ct. 802, 807 (1981). ("This Court has no supervisory jurisdiction over state courts. . . .")

No different conclusion is required by *Rose* v. *Mitchell,* 443 U.S. 545 (1979), a case mentioned by the majority below. In that case, this Court held that the Constitution does not permit a conviction to stand if it is obtained following indictment by a grand jury which was selected in a racially discriminatory way, even if the accused was not prejudiced

because he was subsequently convicted by a properly constituted petit jury. The Court explained its deviation from the usual prejudice rule by stating that racial discrimination at any stage of the criminal justice system is "odious in all respects, is especially pernicious in the administration of justice . . . [and] thereby casts doubt on the integrity of the judicial process." *Id.* at 555-6. *See also Peters* v. *Kiff*, 407 U.S. 493, 506-07 (1972) (White, J., concurring). Here, there is, of course, no claim of racial discrimination.

More to the point is *United States* v. *Morrison, supra.* In *Morrison,* this Court reaffirmed the principle that serious error, even one rising to the level of a violation of the constitutional right to counsel, does not require interference with a criminal proceeding unless the accused was prejudiced by the error. In the opinion for the Court, Mr. Justice White assumed that the drug enforcement agents in that case intruded upon the defendant's sixth amendment right to the assistance of counsel, but emphasized that there was "no prejudice of any kind . . . to the ability of her counsel to provide adequate representation . . . ." —— U.S. at ——, 101 S. Ct. at 669. Thus, concluded the Court, the indictment should not have been dismissed.

It makes no difference that *Morrison* involved review of the dismissal of an indictment rather than a remand for a new trial. As Mr. Justice White wrote "[t]he Sixth Amendment violation, if any, accordingly provides no justification for interfering with the criminal proceedings against respondent Morrison, much less the drastic relief granted by the Court of Appeals" (*id.*). This language makes clear that, even in a federal prosecution, absent actual demonstrable prejudice, interference with the sixth amendment right to the effective assistance of counsel provides no justification for a new trial. *See also Weatherford* v. *Bursey,* 429 U.S. 545, 552, 558 (1977). Surely, the same

result is called for in a state prosecution when a prosecutor's failure to disclose is shown not to have prejudiced an accused's sixth amendment right to an impartial jury. That there was no such prejudice is demonstrated by the factual findings of the state judge.

(2) The state judge's finding that the juror was not biased is presumed correct, and is fully supported by the record.

In determining whether juror Smith, by seeking a position with the prosecuting agency, had become partial, the state trial judge, Justice Birns, conducted a post-verdict hearing as required by state law. *See* N.Y. Crim. Proc. Law §§330.30(2), 330.40(2)(f); *People* v. *Ciaccio*, 47 N.Y. 2d 431, 437, 391 N.E.2d 1347, 1350, 418 N.Y.S.2d 371, 374 (1979). As noted, this is precisely the procedure required by this Court in the *Remmer* case.

Moreover, Justice Birns showed particular sensitivity to the Constitution by requiring proof, and being satisfied, beyond a reasonable doubt that juror Smith had not been biased (App. E at 57a). In imposing such a heavy burden of proof, the state judge refused to follow a state statute which would have required respondent Phillips to establish by a preponderance of the evidence that the pending letter had in fact biased the juror in favor of conviction. *See* N.Y. Crim. Proc. Law §330.40(2)(g).

Phillips was vigorously represented by trial counsel at what can only be described as a full, fair and adequate hearing. Accordingly, under 28 U.S.C. §2254(d), Justice Birns' resolution of the factual issue involving Smith's alleged bias is presumed correct. As this Court recently observed:

> Federal habeas has been a source of friction between state and federal courts and Congress obviously meant

> to alleviate some of that friction when it enacted subsection (d) in 1966 as an amendment to the original Federal Habeas Corpus Act of 1867 .... [I]t is clear that in adopting the 1966 amendments, Congress in §2254(d) intended not only to minimize that inevitable friction but to establish that the findings made by the state court system "shall be presumed to be correct" unless one of the seven conditions specifically set forth in §2254(d) was found to exist by the federal habeas court. *Sumner* v. *Mata*, —— U.S. at ——, 101 S. Ct. at 770-71, *supra*.

Despite the 2254(d) presumption, the circuit majority, without pointing to any statutory exception to the presumption, was willing only to "assume for purposes of argument that the trial judge might find after a hearing that the juror was of so staunch a character and such extraordinary sensitivity and righteousness that his judgment would not be affected, even subconsciously, by his interest in his future employment" (App. A at 10a). In light of the record, and the 2254(d) presumption, the majority's cavalier treatment of the state hearing was hardly warranted.

Reading the record, especially the voir dire of juror Smith and his testimony at the post-verdict hearing, it is impossible to conclude that Smith was influenced by the fact that he had sent a letter seeking future employment with the prosecution. To be sure, as found by Justice Birns, sending the letter was an indiscretion (App. E at 55a). Nonetheless, after extensive cross-examination, Smith impressed Justice Birns as an honest Vietnam veteran who had just graduated from Columbia University and who had "faith in his own integrity, [and] in his own ability to render a verdict on the evidence" (App. E at 49a). Moreover, Smith's nonverbal reaction to questions, the tone and inflection of his voice in his answers, and other aspects

of his demeanor were all probative on the issue of his bias during trial. Indeed, in the "determination of [a juror's] impartiality . . . demeanor plays such an important part . . ." (*Ristaino* v. *Ross*, 424 U.S. 589, 595 [1976]). Similarly, the state trial judge had also been in a position to observe Smith's reactions as the trial progressed. *See United States* v. *Panebianco*, 543 F.2d 447, 457 (2d Cir. 1976), *cert. denied*, 429 U.S. 1103 (1977).

In his brief to the Second Circuit, respondent Phillips argued that "given human nature," juror Smith must have been "guided in his deliberations by reasons of paramount self-interest" (Second Circuit Brief for Respondent: 9). However, thoughtlessness and naivete are as much the products of human nature as acting in one's own interest, and the record here clearly supports the finding that Smith was not guided by self-interest in his deliberations. Notably, Smith recognized his naivete in the matter and did not seek to justify sending the letter (Smith: H 725).

Throughout the questioning, Smith answered candidly and each answer demonstrated further his impartiality. For example, when defense counsel suggested that the possibility of a job led Smith to influence other jurors, Smith stated indignantly, "[t]o imply that I worked the jury's mind is repugnant to me and to the other jurors" (Smith: H 747). Again, in direct response to a defense challenge to his integrity, Smith responded, "I swore an oath to listen to the evidence and to render a verdict on the evidence. I did did so" (Smith: H 747). Similarly, in response to defense counsel's repeated questions as to whether he had any hope for the job if he voted to acquit, Smith replied, "I didn't thing about whether or not to acquit or convict Phillips had anything to do with the job. I didn't think about it at all, one way or the other" (*id.* at H 748-49).

Also relevant to show Smith's impartiality were the candid answers during voir dire in which Smith revealed his interest, participation and career goals in law enforcement. He had worked as a security guard at Bloomingdale's, had made arrests in this capacity, and had then cooperated with the New York County District Attorney's Office. He also was friendly with at least one former legal aid attorney, the man, in fact, who had recommended that he apply to the prosecutor's office. As Smith testified at the hearing, he knew that the prosecutor's office was a very large organization and that the assistant district attorney who would process his application would have nothing to do with the Phillips trial (Smith: H 725, 747). Thus, in light of Smith's educational and employment background, it is difficult to conclude that he believed for a moment that a conviction would enhance, in any way, his employment prospects.

During trial and after the verdict, Smith never mentioned his status as a juror in his application, never communicated with and was never contacted by the prosecutors, and had no reason to think they even knew of his interest in the position. Thus, Smith neither suggested to anyone in the District Attorney's Office that he would vote for conviction if his application were accepted, nor did he have any reason to believe that this, though not stated, was understood. True, Smith's friend Fontane sought to move Smith's application along by speaking to employees of the District Attorney. Nonetheless, as the district court stated, "Smith was apparently unaware of such efforts and had not requested they be undertaken" (App. B at 25a).

Notably, there is no suggestion in the record that Smith even once suggested to friends that his jury vote was in any way related to his application. Indeed, after the verdict,

when asked by his attorney friend who had recommended that he apply to the District Attorney, all Smith said was that he and the jury voted for conviction because of the overwhelming evidence of guilt after a period of deliberations which "wasn't very long" (Smith: H 764). Not once did he tell his friend, or anyone in the District Attorney's Office, that he had ever entertained the slightest hope that his position as a juror would gain him some leverage in his attempt to obtain a position. Indeed, as he testified, the job application had nothing to do with his duty as a juror and he did not think that the District Attorney would care about his actions as a juror (Smith: H 750). All of this demonstrated that Smith believed that there was no connection between his serving on the jury and the job application.

That he saw no connection is further shown by the fact that the day after the verdict, he telephoned the assistant district attorney to whom he had sent the application to ask about its progress; but even then he did not mention that he had been a juror in this case. Smith later asked his attorney friend to inquire about the application, and when Smith learned that only more experienced investigators would be hired, he simply abandoned hopes of obtaining the position, without ever mentioning his jury service.

Both the court below (App. A at 7a) and respondent at page 5 of his brief in opposition to certiorari questioned whether the juror's denials at the hearing were an adequate foundation upon which to base a finding of impartiality. Of course, this overlooks the state judge's extensive opportunities to observe Smith's demeanor, throughout the trial and, in particular, during his testimony at the hearing. Moreover, the conclusion of impartiality is based on more

than the juror's denials at the hearing and his demeanor. Rather, the conclusion of impartiality is also based upon evidence of what Smith did and did not do during and after trial, which demonstrated fully that he saw no connection between jury service and the job application and thus could not have been influenced by any connection. That he believed that there was no connection was confirmed by all his friends and acquaintances as well as the prosecutors who testified.

In sum, Justice Birns had every reason to conclude that Smith appreciated fully the meaning of his oath and that his duty as a juror could in no way be compromised by his pending application. This presumptively correct conclusion was credited by the district court. Notwithstanding the circuit court's cavalier treatment, the state judge's conclusion is supported eloquently, persuasively and fully by the record.

Of course, the state judge's finding of impartiality, indeed the entire hearing, would be irrelevant if, as the district court held, the law created an irrebuttable presumption of bias from the letter itself. Here too, error was committed.

(3) The Constitution requires challenges only to jurors who are determined to be actually biased.

Unlike the circuit court, the district court did not focus on the issue of prosecutorial misconduct. Instead, according to the district court, notwithstanding Smith's impartiality, the hypothetical reasonable man after applying for a job with the prosecutor would have been influenced by a belief (one not held by Smith) that unless he voted for conviction, he would not be considered for the position. Thus, the district court held that juror Smith's letter gave rise to an irrebuttable presumption of bias.

The district court seems to have overlooked the fact that the issue here involves a sitting juror who, during trial, sent a letter applying for a position with the prosecutor's office. The court analyzed the issue as if it arose during jury selection. Curiously, the district court referred to but one case dealing with juror misconduct during trial, a case which states that communications between jurors and non-jurors at most raise only a rebuttable presumption of prejudice. *Mattox* v. *United States*, 146 U.S. 140, 150 (1892). As demonstrated earlier, in the context of a sitting juror's alleged misconduct, the Constitution requires that the verdict be vacated only if the juror's actions demonstrate that he was actually biased (*see* cases cited in text at p. 26, *supra* and in note 8, at p. 25, *supra*). A presumption, if one is applicable at all, is merely a rebuttable one; thus the district court erred.

Indeed, the district court was wrong even if the issue is analyzed in the context of jury selection. The district court was wrong, because during jury selection the Constitution requires only that a criminal defendant be afforded an opportunity to challenge potential jurors who are actually biased. *See Irvin* v. *Dowd*, 366 U.S. 717, 723 (1961); *United States* v. *Wood*, 299 U.S. 123, 146, 150 (1936).

True, as recognized by the district court, the right to an impartial jury is at the very heart of due process. *See Irvin* v. *Dowd*, 366 U.S. at 721-22. Thus, the Constitution prohibits systematic procedures which produce conviction-prone juries. *See Fay* v. *New York*, 332 U.S. 261, 294 (1947); *Henson* v. *Wyrick*, 634 F.2d 1080, 1083-85 (8th Cir. 1980, *cert. denied*, —— U.S. ——, 101 S. Ct. 1417 (1981). In addition, a jury must represent a fair cross-section of the community, and jury selection procedures based upon racial or other invidious criteria are invalid. *See, e.g., Peters* v. *Kiff*, 407 U.S. 493, 497-8 (1972); *Avery* v. *Georgia*,

345 U.S. 559, 561 (1953); *Taylor* v. *Louisiana*, 419 U.S. 522, 533 (1975). However, within these limitations and assuming a fair and meaningful opportunity to show actual bias (*see Ham* v. *South Carolina*, 409 U.S. 524, 527 (1973), the process through which individual jurors are selected, *e.g.*, peremptory challenges or challenges for cause, is not prescribed by constitutional mandate and may vary from state to state. *See Swain* v. *Alabama*, 380 U.S. 202, 219-21 (1965); *Fay* v. *New York*, 332 U.S. at 294, *supra; United States* v. *Wood*, 299 U.S. at 146, *supra; Stilson* v. *United States*, 250 U.S. 583, 586 (1919).

For example, many states have statutes which set forth certain conduct or status which automatically disqualifies a person from sitting on a particular jury, regardless of whether that person is actually biased. [12] This is known as exclusion for implied bias. Thus, virtually all states by statute exclude those persons related within a certain degree of consanguinity to the prosecution or defense counsel, a witness, or the defendant.[13]

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12. *See* Cal. Penal Code §1074 (West); Idaho Code Crim. Proc. §19-2020; Minn. Stat. Ann. R. Crim. P. 26.02(5) (West); N.Y. Crim. Proc. Law §270.20(1); N.D. Cent. Code §29-17-36; Okla. Stat. Ann. title 22 §660 (West); Ore. Rev. Stat. §136.220; S.D. Codified Laws Ann. §23A-20-13; Utah Code Ann. §77-35-18(e).

13. *See, e.g.*, statutes cited in note 12, *supra*. New York goes further than most states or any constitutional requirement and by statute disqualifies at the time of jury selection any person who has a relationship to a party or witness to the action which is likely to preclude that person from rendering an impartial verdict. N.Y. Crim. Proc. Law §270.20(1)(c). This provision, added to the statute in 1971, calls for the application of a reasonable man standard and does not focus on the impartiality of the particular potential juror. *See, e.g., People* v. *Provenzano*, 50 N.Y.2d 420, 424, 407 N.E.2d 408, 410, 429 N.Y.S.2d 562, 563 (1980); *People* v. *Branch*, 46 N.Y.2d 645, 650-51, 389 N.E.2d 467, 468-69, 415 N.Y.S. 2d 985, 987 (1979). Notably, the New York Court of Appeals has held, as have the courts of most states, that it is the province of the legislature to create, or remove, particular grounds for challenge for "implied bias" and that no challenge on a particular ground lies absent such statutory provision. *See People* v. *McQuade*, 110 N.Y. 284, 300-01, 18 N.E. 156, 164 (1888); *see also People* v. *Stokes*, 53 N.Y. 164, 173 (1873), *quoted with approval* in *United States* v. *Wood*, 299 U.S. at 146, *supra*.

Noteworthy is that the courts of most states have historically held that no challenges for "implied bias" exist in their common law; hence, the only grounds permitted for imputing "implied bias" are those specifically enumerated by statute.[14] By contrast, some states permit no challenges on the ground of "implied bias" but look only to whether jurors can in fact be impartial.[15] On the other hand, in the federal jurisdiction, and some of the states, there are challenges for implied bias, which are not governed by a detailed court rule or statute but have been addressed on a case-by-case basis.[16]

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14. *See, e.g., People* v. *Wilkes,* 44 Cal. 2d 679, 685, 284 P.2d 481, 485 (1955); *State* v. *Scoble,* 28 Idaho 721, 723, 155 P. 969, 970 (1916); *Sorseleil* v. *Red Lake Falls Milling Co.,* 111 Minn. 275, 277, 126 N.W. 903, 904 (1910); *People* v. *McQuade,* 110 N.Y. at 300-01, 18 N.E. at 164, *supra; State* v. *Morse,* 35 S.D. 18, 27, 150 N.W. 293, 297 (1914); *Petcosky* v. *Bowman,* 197 Va. 240, 254, 89 S.E.2d 4, 14 (1955); *Redwine* v. *Fitzhugh,* 78 Wyo. 407, 421, 329 P.2d 257, 261 (1958). *See generally,* Anno., *Professional or Business Relations Between Proposed Juror and Attorney as Ground for Challenge for Cause,* 72 ALR2d 673, §2, pp. 674-75, §4, pp. 676-79, §6, pp. 680-81 (1958). *See also* statutes cited in note 12, *supra.*

15. *See, e.g.,* Del. Code Ann. title 11, §3301; Del. Sup. Ct. Crim. Rules, Rule 24(a); *Parson* v. *State,* 275 A.2d 777, 783 (Del. 1971); Ky. Rules Crim. Proc., Rule 9.36; *Hemphill* v. *Commonwealth,* 405 S.W.2d 956, 958 (Ky. 1965).

16. *See* 28 U.S.C. §1870; *Leonard* v. *United States,* 378 U.S. 544 (1964); *Haussener* v. *United States,* 4 F.2d 884, 886 (8th Cir. 1925); *compare United States* v. *Brown,* —— F.2d —— (2d Cir. March 16, 1981), *with United States* v. *Allsup,* 566 F.2d 68, 71-72 (9th Cir. 1977); Conn. Gen. Stat. Ann. §54-82(f) (West); *State* v. *Kokoszka,* 123 Conn. 161, 163, 193 A. 210, 211 (1937); N.H. Rev. Stat. Ann. §§606:1-4; *State* v. *Howard,* 17 N.H. 171 (1845), *overruled on other grounds, Shulinsky* v. *Boston & M. R.R.,* 83 N.H. 86, 89, 139 A. 189, 191 (1927); W. Va. Code §62-3-4; *State* v. *West,* 157 W.Va. 209, 219, 200 S.E.2d 859, 865 (1973).

In *United States* v. *Burr,* 25 Fed Cas. 49, 50 (C. C. Va. 1807), Chief Justice Marshall wrote that a person "may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it supposes prejudice because, in general, persons in a particular situation would feel prejudice." Interestingly, in *Burr,* the juror in question was excluded after stating that he had a preconceived opinion that Burr had the intent to commit treason, the crime charged. This preconceived opinion, of course, demonstrated actual rather than implied bias.

Recognizing this diversity of approach, the Court, in *United States* v. *Wood,* 299 U.S. at 146, *supra,* declared that, although the sixth amendment guarantees the right to an impartial jury,

> the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula. State courts enforcing similar requirements of state constitutions as to trial by jury have held that legislatures enjoy a reasonable freedom in establishing qualifications for jury service, although these involve a departure from common law rules.

The decision in *Wood* upheld a statute designed to nullify a prior decision, *Crawford* v. *United States,* 212 U.S. 183 (1909), which held that governmental employees could not sit as jurors in criminal prosecutions in the District of Columbia. This Court concluded that even if all governmental employees were excludable at common law for "implied bias" (a supposition which the Court disputed), and, moreover, even if employees of the prosecuting agency itself were excludable at common law for "implied bias," the Constitution does not require the automatic exclusion of such persons. The Court explained, "[w]e think that the imputation of bias simply by virtue of governmental employment, without regard to any actual partiality growing out of the nature and circumstances of particular cases, rests on an assumption without any rational foundation." 299 U.S. at 149.

This Court in *Wood* realized that isolated instances would occur in which the trial court would encounter the possibility of actual partiality. The Court stated, "we

must assume that the [trial] courts . . . , with power fully adequate to the occasion, will be most careful in those special instances, where circumstances suggest that any actual partiality may exist, to safeguard the just interests of the accused." 299 U.S. at 150. Thus, the Court, rather than precluding, "without any rational foundation," entire categories of jurors from serving (*id.* at 149) properly charged the trial courts with determining whether individual jurors were, in fact, partial. *See also Dennis* v. *United States,* 339 U.S. 162, 168 (1950); *Frazier* v. *United States,* 335 U.S. 497, 511 (1948).[17]

Thus, even if the issue here arose in a jury selection context, exclusion for implied bias would not be required by the Constitution. Further, the reason that courts generally do not favor non-statutory irrebuttable presumptions of bias even before trial is well demonstrated by this case. The district court judge looked only to the fact of the job application and concluded that the hypothetical average man would have been influenced by a belief that if he voted for acquittal, he would have no chance for the position. Yet, here the application by itself did not mean that Smith had had a direct substantial economic dependence on the

17. Notably, the Second Circuit, even as recently as last March, has expressly refused in federal prosecutions to "create a set of unreasonably constricting presumptions that jurors be excused for cause due to certain occupational or other special relationships which might bear directly or indirectly on the circumstances of a given case, where . . . there is no showing of actual bias or prejudice." *United States* v. *Brown,* —— F.2d at ——, *supra,* note 16, quoting *Mikus* v. *United States,* 433 F.2d 719, 724 (2d Cir. 1970); *accord, United States* v. *Johnson,* 401 F.2d 746, 747 (2d Cir. 1968).

New York County District Attorney's Office.[18] To stop the inquiry at the fact of the application, as did Judge Pierce in applying a conclusive presumption, makes little sense, especially since an examination of the other facts developed at the post-trial hearing leads inexorably to the conclusion that by merely writing a letter expressing interest in a job, Smith had not become a biased juror (*see* pp. 34-39, *supra*).

Of course, if it had been shown that Smith believed that he would receive a direct benefit from a conviction then a different case would have been presented. This is the teaching of *Tumey* v. *Ohio*, 273 U.S. 510 (1927), referred to by both the circuit and district courts. In that case the village mayor, who served as a justice of the peace, had a direct and substantial pecuniary interest in convicting de-

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18. Some state courts have applied conclusive presumptions when there is a direct substantial economic dependence upon one of the lawyers or parties. *Compare Loayza* v. *Brooklyn & Queens Transit Corp.*, 254 App. Div. 577, 578, 2 N.Y.S.2d 894, 895 (2d Dept. 1938) (juror impliedly biased because wife had similar civil action pending against same defendant in same court) and *Turner* v. *Montgomery Ward & Co.*, 165 S. Car. 253, 258-59, 163 S.E. 796, 797-98 (1932) (two jurors properly discharged on voir dire where they said they worked for defense counsel and had an interest in seeing their employer win the case) and *Block* v. *State*, 100 Ind. 357, 364 (1885) (juror, a deputy of the district attorney trying the case, was impliedly biased) *with C.A. Rees & Co.* v. *Road Improvement Dist. No. 1*, 167 Ark. 383, 387, 267 S.W. 770, 771 (1925) (juror not impliedly biased because he was a business associate of defendant's lawyer and also one of the commissioners of the defendant governmental agency) and *People* v. *Wilkes*, 44 Cal. 2d at 685, 284 P. 2d at 485, *supra* (two jurors were not impliedly biased even though they had as their personal counsel a deputy district attorney and the district attorney trying the case) and *Sorsoleil* v. *Red Lake Falls Milling Co.*, 111 Minn. at 277, 126 N.W. at 904, *supra* (no implied bias merely because juror was client of attorney trying the case), and *Redwine* v. *Fitzhugh*, 78 Wyo. at 421, 329 P.2d at 261, *supra* (same) and *McGeever* v. *State*, 239 Wis. 87, 96-97, 300 N.W. 485, 489 (1941) (no implied bias of a juror who was a part time dance hall inspector employed under the supervision of the district attorney), and *Klinck* v. *State*, 203 Ind. 647, 651-52, 179 N.E. 549, 551 (1932) (no implied bias even though trial prosecutor was executor of an estate of which juror and his wife were beneficiaries). *See generally* Anno., 72 ALR2d 673, *supra* note 14.

fendants because the only source of payment for his judicial services was fines imposed after convictions. In this extreme setting the Court observed that:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law (*id.* at 532); *see also Connally* v. *Georgia*, 429 U.S. 245, 247-49 (1977).

As the above quotation makes clear, *Tumey*, as distinguished from the instant case, involved a systematic procedure which assured that the trial judge knew he would benefit personally from a conviction. *Accord, Connally* v. *Georgia, supra.* As this Court emphasized in *Tumey*, each accused appearing before this judge was compelled "to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him . . ." (*id.* at 523). In view of this interest, the prosecution could not realistically have met its burden of showing that the judge was actually unbiased.

Similarly, it is impossible to show the absence of juror bias where racial and other systematic exclusions result in juries not fairly representative of a cross-section of the community. As recognized in the plurality opinion by Mr. Justice Marshall in *Peters* v. *Kiff*, 407 U.S. 493, *supra*, in such situations, in which there is an "appearance of bias," prejudice is automatically assumed because the exclusion of a segment of the community can deprive the jury of "a perspective on human events that may have unsuspected importance in any case that may be presented" (*id.* at 503-04, *supra*); and there is no way in a particular

case to determine whether the absence of such a perspective affected the verdict. Where, however, the impartiality of an individual juror is questioned, the presence or absence of bias can be determined readily. In this case, as found by the state judge, Smith's application for employment on its face did not demonstrate that Smith would, in fact, receive a benefit upon conviction, nor did it show that Smith believed he would receive such a benefit. App. E at 51a; *cf. United States ex rel. Moore* v. *Fay*, 238 F. Supp. 1005, 1007 (S.D.N.Y. 1965) (Weinfeld, J.). Put simply, the interest, if any, of juror Smith was much more remote than that of the judge in *Tumey*, and whether or not Smith was actually biased could have been, indeed was, determined at a hearing.

Moreover, *Tumey* involved a judge's bias, while this case involves alleged juror bias. True, the Constitution requires that both judges and jurors be impartial. However, once judicial bias is alleged, the allegation is not examined in detail by an impartial arbiter. Rather, the judge himself generally decides whether or not he should preside. *See, e.g.*, 28 U.S.C. §455. A hearing to determine a judge's state of mind would be particularly unseemly both because of a judge's stature and position in the criminal justice system and because the arbiter of his impartiality would be a colleague. Thus, the mere appearance of partiality on the part of a judge requires recusal. On the other hand, the impartiality of a juror is reviewable by a neutral judge. Accordingly, the actual bias standard for jurors is not only constitutionally sufficient, but easily implemented.

In sum, the district court erred in concluding that the Constitution required a challenge for implied bias in this case, a conclusion which is especially erroneous because implied bias challenges apply, if at all, only during jury

selection. Here, the alleged bias came into existence during trial and the Constitution requires the removal of sitting jurors only upon a showing of actual bias, which was not present in this case.

• • •

Returning briefly to the decision below, at the core of the Second Circuit's departure from accepted principles is its incorrect insistence that the crucial issue in this case was prosecutorial misconduct. From this false premise the majority seems to have concluded that even if the juror was actually impartial the prosecutor's failure to disclose the job application by itself deprived the accused of due process (App. A at 10a). However, because juror Smith was found to be actually unbiased after a full, fair and adequate hearing, Phillips has been convicted by twelve impartial jurors. The Constitution requires no more.

To be sure, the trial prosecutor was wrong in failing to disclose the juror's letter. Nonetheless, that wrongful conduct did not prejudice Phillips and it makes poor sense and worse law to punish the people of New York State by requiring a new trial, twelve years after the crime (with all of the attendant problems), for a corrupt police officer who was convicted of two murders on overwhelming proof of guilt by twelve jurors, not one of whom has been found to be anything but impartial. By seeking reversal, we seek no vindication for the trial prosecutor. Rather, we seek vindication of the accepted legal principles from which the courts below so clearly departed, thereby unjustifiably interfering in a most significant state criminal prosecution.

Conclusion

The judgment appealed from should be reversed.

Respectfully submitted,

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APPENDIX

This appendix contains only the statutory and constitutional provisions involved. References in the brief to lettered appendices (*e.g.*, App. A-G) are to the appendix to the petition for certiorari.

Constitutional and Statutory Provisions Involved

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> . . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

28 U.S.C. §2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. §2254(d) of the United States Code provides, in pertinent part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> * * *
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

• • •

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

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Former section 270.35 (amended L. 1975, c. 77, §1) of the New York Criminal Procedure Law provided:

• • •

2. If at any time after the trial jury has been sworn and before its rendition of a verdict the court is satisfied, from facts unknown at the time of the selection of the jury, that a juror is grossly unqualified to serve in the case, or that a juror has engaged in misconduct of a substantial nature but not of a kind to require the declaration of a mistrial pursuant to subdivisions one and two of section 280.10, the court may, if an alternate juror or jurors are available for service, discharge such trial juror and order that he be replaced by the alternate juror whose name was first drawn and called. If no alternate juror is available, such trial juror may not be discharged, and the trial must proceed.

Section 280.10 of the New York Criminal Procedure Law provides, in pertinent part:

> At any time during the trial, the court must declare a mistrial and order a new trial of the indictment under the following circumstances:
>
> 1. Upon motion of the defendant, when there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, which is prejudicial to the defendant and deprives him of a fair trial. . . .

Section 330.30 of the New York Criminal Procedure Law provides, in pertinent part:

> At any time after rendition of a verdict of guilty and before sentence, the court may, upon motion of the defendant, set aside or modify the verdict or any part thereof upon the following grounds:
>
> * * *
>
> 2. That during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict; . . . .

Section 330.40 of the New York Criminal Procedure Law provides, in pertinent part:

> * * *
>
> 2. A motion to set aside a verdict based upon a ground specified in subdivisions two and three of section 330.30 must be made and determined as follows:
>
> (a) The motion must be in writing and upon reasonable notice to the people. The moving papers must contain sworn allegations, whether by the defendant or by another person or persons, of the occurrence or existence of all facts essential to support

the motion. Such sworn allegations may be based upon personal knowledge of the affiant or upon information and belief, provided that in the latter event the affiant must state the sources of such information and the grounds of such belief;

(b) The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers;

(c) After all papers of both parties have been filed, the court must consider the same and, if the motion is determinable pursuant to paragraphs (d) or (e), must or may, as therein provided, determine the motion without holding a hearing to resolve questions of fact;

(d) The court must grant the motion if:

(i) The moving papers allege a ground constituting legal basis for the motion; and

(ii) Such papers contain sworn allegations of all facts essential to support such ground; and

(iii) All the essential facts are conceded by the people to be true.

(e) The court may deny the motion if:

(i) The moving papers do not allege any ground constituting legal basis for the motion; or

(ii) The moving papers do not contain sworn allegations of all facts essential to support the motion.

(f) If the court does not determine the motion pursuant to paragraphs (d) or (e), it must conduct a hearing and make findings of fact essential to the determination thereof;

(g) Upon such a hearing, the defendant has the burden of proving by a preponderance of the evidence every fact essential to support the motion.

Rule 24(c) of the Federal Rules of Criminal Procedure provides, in pertinent part:

> The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties.